Adobe Walls, Inc. *and* Locals 334 and 1076, Laborers International Union of North America, AFL–CIO. Case 7–CA–30461

September 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 6, 1991, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the judge's recommended Order.

[1] In its exceptions, the Respondent argues that it clearly repudiated the contract in May 1989 by ceasing to make fringe benefit fund payments, and that the Union acknowledged the repudiation by filing a grievance and picketing. The Respondent further argues that because this repudiation began more than 6 months prior to the filing of the charge on April 18, 1990, the allegation of unlawful repudiation of the collective-bargaining agreement is barred by Sec. 10(b). The Respondent's failure to comply fully with some of the provisions of the contract does not, standing alone, establish that the contract was repudiated. It is well settled that the mere refusal to adhere to a provision of a collective-bargaining agreement does not amount to total contract repudiation. See *A & L Underground*, 302 NLRB 467 (1991). We see nothing in the Union's attempts to enforce the contract, through the filing of a grievance and picketing, which could be construed as an acknowledgement that the Respondent had repudiated the agreement. Therefore, we find no merit in the Respondent's contention that its admitted refusal to adhere to a provision of the contract since May 1989 amounted to a repudiation of the contract, much less clear notice of such repudiation. Absent any clear repudiation dating from May 1989, we find no merit in the Respondent's 10(b) contention.

Chairman Stephens agrees with the result here because he finds this case distinguishable from *Wilson & Sons Heating & Plumbing*, 302 NLRB 802 (1991), and *Fortney & Weygandt, Inc*., 298 NLRB 863 (1990), in which he dissented. The Respondent here, unlike the employers in those cases, signed the master agreement itself, and that agreement contained a clause (art. XVI) providing that notice by the Union to the Poured Concrete Wall Association to reopen the contract for modification will be considered notice to the individual employer signatory and that, unless the individual signatory notifies the Union within specified dates that it wishes not to be bound by any new agreement reached by the Union and the Association, it will be bound. Chairman Stephens observes that there is no mistaking the meaning of that provision, and he finds it consistent with the rationale of *John Deklewa & Sons*, 282 NLRB 1375 (1987), to hold the Respondent to its agreement.

Member Devaney, in agreeing with his colleagues that there is no merit in the Respondent's 10(b) contention, finds it unnecessary to determine whether the Respondent's failure to comply with the terms of the collective-bargaining agreement rises to the level of a total contract repudiation. In this regard, Member Devaney notes that the charge on which the instant complaint allegation is based was filed during the term of the collective-bargaining agreement. See his dissent in *A & L Underground*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Adobe Walls, Inc., Mt. Morris, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[2] In agreeing with the judge that the pending RM and RD petitions are not determinative of the issues in this proceeding, Chairman Stephens and Member Raudabaugh find it unnecessary to rely on *W. A. Krueger Co*., 299 NLRB 914 (1990).

Linda Grayson, Esq., the General Counsel.
Hiram Grossman, Esq., of Flint, Michigan, for the Respondent.
George H. Kruszewski, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Burton, Michigan, on October 18 and 19, 1990. Subsequently, briefs were filed by the General Counsel and Respondent. The proceeding is based on a charge filed April 18, 1990,[1] by Locals 334 and 1076, Laborers International Union of North America, AFL–CIO. The Regional Director's complaint dated June 26, alleges that Respondent Adobe Walls, Inc.,[2] of Mt. Morris, Michigan, violated Section 8(a)(1) and (5) of the National Labor Relations Act by failing and refusing to apply and abide by the terms of an applicable collective-bargaining agreement.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the construction of poured concrete walls. It annually provides services valued in excess of $50,000 for general contractors in Michigan which, in turn, annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Michigan. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent is a building contractor specializing in the pouring of basement walls for residential structures. Charles Taylor is president and coowner of the business with his wife, Yvonne. Their son, Reuben, is a supervisor of its con-

[1] All following dates will be in 1990 unless otherwise indicated.
[2] At the request of the General Counsel the title is corrected to reflect the correct name of Respondent to Adobe Walls, Inc., from Adobe Walls, Ltd. in conformity with the testimony of Respondent's president Charles Taylor that the latter is the official corporate name.

struction crews which are made up of laborers and carpenters.

Union Locals 334 and 1076 represent laborers in the unions respective geographical jurisdictions in the metropolitan Detroit area. All the labor agreements to which they are parties are entered into jointly, they are joint bargaining representatives under all of the contracts they administer and this status prevails regardless of which local union obtains the employer's signature (in practice, an agent of only one of the local unions will sign an agreement with a particular contracting employer).

One jointly administered contract is with the Poured Concrete Wall Association, Inc., a multiemployer. Locals 334 and 1076 have had successive contracts with the Association for over 30 years. Although the Respondent is not a member of the Association, it and some 6 to 12 independent contractors have signed agreements binding them to the terms of the Association's contracts.

On May 11, 1988, by prior arrangement, Reuben Taylor, with his father's authorization, represented the Respondent in a meeting with Local 1076 Secretary/Treasurer William Ray and some other union agents at a restaurant. Reuben Taylor had previously been given a copy of the then-current PCWA contract (1987–1989), and he asked some questions about the agreement, and discussed it for approximately 30 minutes with the union representative. Ray pointed out the wage and benefit provisions applicable to Respondent's laborers and Reuben Taylor completed the page of the booklet entitled ''Acceptance of Agreement by Employers (Not Members of the Association),'' making a handwritten entry of the company's name and address, and he affixed his signature and the date on the same page where the following statement was printed:

> The undersigned has read and hereby agrees to be bound by the terms and conditions set forth in the foregoing Agreement and adopts the same and becomes one of the parties thereto . . . .

The master agreement provided specific rules in article XVI relating to the duration and termination of the contract, as follows:

> This Agreement shall continue in effect in all respects until midnight July 31, 1989 and thereafter from year to year in the event that no reopening notice has been served. If a change in the Agreement is desired by either party hereto, the party seeking the change shall serve written notice thereof upon the other party not more than ninety (90) nor less than sixty (60) days prior to the expiration date of this Agreement and a joint meeting of both parties shall then be held for the purpose of discussing the proposed change and of incorporating such amendments or alterations as may be agreed upon.
>
> The undersigned Employer hereby recognizes the Union as the sole and exclusive collective-bargaining representative of all those employed by the Employer as laborers in the geographical area described in the preamble to the foregoing agreement on all present and future jobsites based upon the fact, acknowledged by the Employer to be true, that the Union represents and has represented a majority of those employees.
>
> The Employer agrees to adopt the foregoing agreement, to be bound by all the terms and conditions of the Agreement and amendments thereto, including the effective dates, and to become a party thereto. It is also agreed by the undersigned Employer that any notice given by the Union to the Association pursuant to Article XVI of the Agreement shall be notice to the Employer and shall have the same legal force and effect as though it were served on the Employer personally.
>
> Finally, the Employer agrees that, unless the Union is notified to the contrary by the Employer by registered mail at least sixty (60) days, but not more than ninety (90) days, prior to the expiration date of this Agreement or any subsequent Agreement, the Employer will be bound by and adopt any Agreement reached by the Union and the Association during negotiations which follow notice by the Union referred to in the preceding paragraph.

Charles Taylor was not present when the agreement was signed, however, he was present at a jobsite where Reuben and William Ray went immediately after leaving the restaurant. According to Ray, Charles Taylor said nothing more than a salutatory greeting during Ray's visit to the site; however, Charles Taylor claims to have said words to the effect that if the Union failed to help enhance the Company's business, ''we're going to be gone'' in a year (Reuben Taylor testified that he and his father told the union officials that if the contract ''didn't work out,'' the Company ''would have to terminate'' it). In any event, neither Taylor claimed that the union representatives concurred in these asserted statements.

Respondent performed under the agreement for approximately 1 year and made regular monthly payment of fringe benefit fund contributions but admittedly ceased making all such contributions after May 1989. Local 1076 initiated grievances over the company's refusal to pay the contractually required wage rates and fringe benefits and the grievances were heard in June 1989 before a joint labor-management committee which ruled against Respondent. A subsequent lawsuit to enforce the committee's award resulted in partial summary judgment for the fringe benefit funds.

On May 31, 1990, Charles Taylor prepared and filed ''RM'' petitions, seeking elections among Respondent's laborers. The petitions cite the ''recognized or certified bargaining agent'' as Locals 334 and 1076.[3]

No notice was served by Respondent during 1989 on Locals 334 or 1076 indication that Respondent wished to modify or terminate the Association's contract, which was due to expire by its terms on July 31, 1989, however, the Unions and the Association gave such notice to each other. The cross-notices were timely under the contract's duration and renewal clauses, which call for notices to reopen to be served 60 to 90 days prior to contract expiration. A successor agreement was reached, effective August 1, 1989, through July 31, 1991. Respondent was sent a copy of the changes reflected in the new 1989–1991 agreement.

By letter dated June 12, 1990, Respondent repudiated its contract and bargaining relationship with Local 1076, stating:

[3] The RM petitions, as well as two decertification petitions, are being held in abeyance, by order of the Board, pending the resolution of the instant unfair labor practice case.

> If Adobe Walls Ltd. has not already terminated its contractual relationship with Local 1076 Laborers Union, this letter is to let you know Adobe Walls Ltd. is immediately terminating its contractual relationship with Local 1076 Laborers Union by and with this letter.

Respondent continues to employ laborers in the geographical areas covered by the Association's agreement. It concedes that it has not made any contributions to the Laborers' fringe benefit trust funds since May 1989, and that it is not heeding the wage scale set forth in the Association's contract (as disclosed in Respondent's 1990 payroll records for its laborers).

Discussion

The record here clearly shows that the Respondent failed to comply with the wage and fringe benefit provisions of the appropriate collective-bargaining agreement between the Union and the contractors association whose members are engaged in the work also performed by the Respondent. The Respondent, however, contends that any relationship between the parties was an 8(f) relationship under the ruling in *John Deklewa & Sons*, 282 NLRB 1375 (1987), and that that relationship ended on July 31, 1989, with the expiration of the 1987–1989 contract.

In the *Deklewa* case (enfd. 843 F.2d 770 (3d Cir. 1988)), the Board held that collective-bargaining agreements permitted by Section 8(f) are enforceable through the mechanisms of Section 8(a)(5). Although an 8(f) contract will not bar the processing of valid petitions filed under Section 9(c) and (e), an employer nonetheless may not lawfully repudiate an 8(f) contract during its term (as pointed out by the General Counsel the ''contract bar'' principle set forth in *Deklewa* is different from the abeyance situation in this case whereby the RM and RD petitions are being blocked not by a contract, but by the pendency of the instant unfair labor practice litigation).

Here, Respondent's acceptance of the 1987–1989 Association's agreement with the Union under Reuben Taylor's signature explicitly made Respondent ''one of the parties'' to the master contract and Respondent thereby agreed that the contract would continue, unless written notice to modify or terminate the contract was served 60 to 90 days prior to the expiration date. Respondent also thereby concurred that notice to the Association would constitute notice to Respondent and agreed that, absent notice to the contrary furnished by it to the Unions 60 to 90 days prior to contract expiration, Respondent would be bound by any successor agreement reached between Locals 334 and 1076 and the Association (all provisions clearly set forth in the contract booklet which Reuben Taylor had when he signed the contract's acceptance page).

When the 1987–1989 Association contract expired on July 31, 1989, Respondent did not serve on the Unions any timely notice to modify or terminate the contract and the notice served by the Association upon the Unions for negotiation of a successor agreement did not constitute notice by Respondent, because Respondent had never delegated bargaining authority to PCWA. See *Fortney & Weygandt, Inc*., 298 NLRB 863 (1990). In any event, Respondent made no attempt to convey a notice of its intent to repudiate or withdraw from its contractual obligation at any timely period in 1989.

At the hearing Charles Taylor attempted to show that when Respondent accepted the agreement on May 11, 1988, he had made certain statements indicating that he thought the union agreement could get him additional business and that he would try it for a year. This parol evidence cannot act to change the terms of the written agreement.[4] Respondent is automatically bound by the successor agreement reached by the Association and the Unions and it specifically is bound by the provisions relating to the method for notice and termination encompassed in the agreement.

Respondent made no clear attempt to terminate the contract until it sent its letter of June 12, 1990, a time period outside of any termination provisions of the agreement. Respondent, however, was prohibited from unilaterally repudiating the contract midterm, see *John Deklewa & Sons*, supra, and *Z-Bro, Inc*., 300 NLRB 87 (1990). As noted, Respondent made no timely attempt to terminate the contract which expired in 1989 and the contract was renegotiated by the Association and it is currently in effect until July 31, 1991. Respondent therefore continues to be bound to the agreement, see *Fortney & Weygandt*, supra.

The Respondent argues that Local Unions 1076 and 334 are separate entities and that it never had a relationship with Local 334 which has jurisdiction in Wayne and Malcomb Counties, Michigan. The term ''Union,'' however, is clearly defined in the Association contracts as including both Locals 334 and 1076. Respondent has therefore consented to recognize the two local unions as joint representatives and the signature of one of the two locals acting on behalf of the joint representative was all that was required to bind the two locals to the contract, see *Crothall Hospital Services*, 270 NLRB 1420, 1423 fn. 17 (1984); *Pharmaseal Laboratories*, 199 NLRB 324 (1972). Moreover, Respondent itself recognized this in its May 1990 RM petitions when it listed both locals as the recognized agents of its laborer employees. Otherwise, Respondent has the burden of proving a change in the identity or the appropriateness of its employees' bargaining representative, *Insulfab Plastics*, 274 NLRB 817, 821 (1985), and here its mere assertion regarding the Union's status fails to show any meaningful factors that would affect the agreement in whole or in part.

In summation, I find that the bargaining agreement involved is enforceable through application of Section 8(a)(5) of the Act and either party is prohibited from unilateral repudiation of the agreement until it expires or until that employer's unit employees vote to reject or change their representative. Here, as noted, RM and RD petitions relevant to the latter factor are pending but not determinative in this proceeding, see *W. A. Krueger Co*., 299 NLRB 974 (1990). Here, Respondent was precluded from unilaterally terminating the contract at any time after its expiration in May 1990, by any means other than those provided in the agreement itself. Respondent therefore continued to be bound until expiration of the current agreement. I find that the General Counsel has shown that Respondent has attempted to withdraw recognition and to repudiate the contract midterm, and that it has further refused to abide by the terms and conditions of the

[4] See, for example, *NDK Corp*., 278 NLRB 1035 (1986); *R. J. E. Leasing Corp*., 262 NLRB 373, 379 (1982); *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945). *Air-Vac Industries*, 259 NLRB 336, 342 (1981). *R. E. C. Corp*., 277 NLRB 1107, 1110 (1985).

agreement by failing and refusing to follow contractual wage provisions and to make required contributions to the fringe benefits funds continuously during and after the 6-month period preceding the filing of the involved charge on April 18, 1990. Accordingly, I further find that Respondent's actions are shown to be violations of Section 8(a)(1) and (5) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent Adobe Walls, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent was party to the 1987–1989 agreement between the Union and Poured Concrete Wall Association, Inc., and was bound by the automatic renewal clause to the successor agreement for the period August 1, 1989, through July 31, 1991.

4. By repudiating the successor agreement on or about June 12, 1990, during midterm of the contract, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By ceasing during the term of the contract to pay contractual wages to unit employees and to make contractually required payments to the fringe benefit fund on and after May 1989, and during and after the 6-month period preceding the filing of the involved charge on April 19, 1990, and to otherwise fail and refused to apply the terms of the applicable collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that it be ordered to reinstate and abide by the terms and conditions set forth in the collective-bargaining agreement with Locals 334 and 1076, Laborers International Union of North America, AFL–CIO and that Respondent make whole the appropriate benefit fund and the unit employees by making all contributions to the fringe benefit fund, as provided in the collective-bargaining agreement that have not been paid and that would have been paid but for the Respondent's unlawful discontinuance of payments.[5] Respondent shall also be ordered to reimburse the unit employees for any expenses ensuing from its failure to make such payments, and make employees whole for any loss of wages due to any difference between wages paid and the wage rate effective under the agreement, as set forth in *Kraft Plumbing & Heating*, supra, enfd. 661 F.2d 940 (9th Cir. 1981), with interest computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In each instance the controlling date for the computation of payment shall be 6 months preceding the filing of the involved charge on April 18, 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Adobe Walls, Inc., Mt. Morris, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating its automatically renewed collective-bargaining agreement with Locals 334 and 1076, Laborers International Union of North America, AFL–CIO and failing and refusing to recognize and abide by the terms of the agreement.

(b) Refusing to bargain with the Union by failing and refusing to make contractually required monetary payments to the fringe benefits fund, and failing and refusing to pay contractual wages without having afforded the Union an opportunity to bargain about such acts and conduct and the effects of such acts and conduct.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate and abide by the terms and conditions of the parties 1989–1991 collective-bargaining agreement; paying all delinquent fringe benefit fund payments as required by that agreement and make unit employees whole for any losses resulting from the Respondent's failure to adhere to the collective-bargaining agreement, including wages and reimbursing them for expenses ensuing from the Respondent's failure to pay benefits pursuant to the collective-bargaining agreement, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payments due under the terms of this Order.

(c) Post at its facility in Mt. Morris, Michigan, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken

[5] Because the provisions of employee benefit fund agreements are variable and complex, the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make-whole'' remedy must be left to the compliance stage. *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT repudiate the automatically renewed collective-bargaining agreement with Locals 334 and 1076, Laborers International Union of North America, AFL–CIO and fail and refuse to recognize and abide by the terms of the agreement.

WE WILL NOT refuse to bargain with the Union by failing and refusing to make contractually required monetary payments to the Fringe Benefits Fund, and by failing and refusing to pay contractual wages without having afforded the Union an opportunity to bargain about such acts and conduct and the effects of such acts and conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate and abide by the terms and conditions of the parties 1989–1991 collective-bargaining agreement; paying all delinquent fringe benefit fund payments as required by that agreement and make unit employees whole for any losses resulting from the Respondent's failure to adhere to the collective-bargaining agreement, including wages and reimbursing them for expenses ensuing from our failing to pay benefits pursuant to the collective-bargaining agreement in the manner set forth in the remedy section of this decision.

ADOBE WALLS, INC.